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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), allows a partial new trial limited solely to the issue of punitive damages.

PARTIES TO THE PROCEEDING

The following are the parties to the proceedings in the District of Columbia Court of Appeals:

Defendants/Appellants:

The Jonathan Woodner Company
The Estate of Jonathan Woodner
Steven Z. Laufer

Plaintiffs/Appellees:

Margaret Adams
Francisca Breeden
Muriel Cardenas
Lydia Headecker
Elise Joyner*
Archie J. McCallum
Stanley Poindexter
Winslow Spady
Clarece Walker Thame*

Pursuant to Supreme Court Rule 29.6, petitioner The Jonathan Woodner Company states that its parent company is the Shipley Corporation and that it has no non-wholly owned subsidiaries.

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* The claims of Ms. Joyner and Ms. Thame were settled during the proceedings in the Court of Appeals and these individuals are therefore not parties to the proceedings in this Court.

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THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

The Jonathan Woodner Company, the Estate of Jonathan Woodner, and Steven Z. Laufer petition this Court for a writ of certiorari to review the order of the District of Columbia Court of Appeals entered August 8, 1996.

OPINIONS BELOW

The order of the Court of Appeals authorizing a partial new trial limited to punitive damages and execution on a partial judgment for compensatory damages is reported at 681 A.2d 1098 and is reproduced in the appendix to this petition ("App.") at 1a. The order of the Court of Appeals denying rehearing and rehearing en banc of that order is unreported and is reproduced at App. 8a. The prior opinion of the Court of Appeals affirming the trial court's judgment in part and reversing in part is reported

at 665 A.2d 929 and is reproduced at page 1a of the appendix to the petition for a writ of certiorari in No. 96-821, filed November 22, 1996. The order of the Court of Appeals granting panel rehearing of that judgment in part and denying rehearing en banc is reported at 681 A.2d 1097 and is reproduced at page 62a of the appendix to the petition in No. 96-821.

JURISDICTION

The order of the Court of Appeals authorizing a partial new trial limited to punitive damages and execution on a partial judgment for compensatory damages was entered on August 8, 1996. That court's order denying panel rehearing and rehearing en banc of the August 8, 1996 order was issued on December 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This petition presents the question of whether the Seventh Amendment to the United States Constitution permits a partial new trial limited solely to the question of punitive damages. The court below—in conflict with the governing decision of this Court and the decisions of the vast majority of courts to have considered the issue—authorized such a partial new trial.[1] As

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[1] Petitioners have already filed a petition for certiorari (No. 96-821) seeking review of an earlier decision of the Court of Appeals in this case that approved an award of compensatory

explained below, the conflict among the lower courts over the question, and the importance of the issue to the fair assessment of punitive awards, warrants this Court's review.

The background to the dispute in this case is set forth more fully in our earlier pending petition, No. 96-821. Respondents (plaintiffs in the trial court) are former tenants in an apartment building in the District of Columbia and petitioners (defendants in the trial court) are the managers of the building. Respondents sued petitioners on a variety of tort theories predicated on the conditions in the building; the trial court entered a single judgment against petitioners for compensatory and punitive damages; and petitioners took a single appeal to the Court of Appeals. The Court of Appeals then issued two separate decisions, each of which warrants this Court's review. But because the court issued these rulings at different times, and separately denied petitions seeking rehearing of them, petitioners were required to file two petitions for certiorari in order to ensure that both rulings were properly and timely before this Court.

In its first decision, issued on September 14, 1995, the Court of Appeals affirmed the trial court's judgment with respect to certain awards of compensatory damages, but reversed the judgment with respect to the awards of punitive damages and remanded for a new trial. The Court of Appeals denied petitions for rehearing of that decision on July 25, 1996. Accordingly, on November 22, 1996, petitioners filed a petition for a writ of certiorari, docketed as No. 96-821, seeking review of the September 14, 1995 decision.[2] As explained in that

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damages. Petitioners request that that petition be considered together with the present one. Petitioners submit that whether the two petitions are considered separately or together, certiorari is plainly warranted in this case.

[2] On October 14, 1996, Chief Justice Rehnquist extended until November 22 the time for petitioners to seek review of the September 14, 1995 decision.

petition, that decision raises an important issue, upon which the lower courts are deeply divided, relating to the proper application of this Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

The present petition arises because the Court of Appeals' denial of rehearing of the September 14, 1995 judgment did not mark the end of its consideration of this appeal. While the petitions for rehearing were pending, respondents had filed with the Court of Appeals a "Motion for Issuance of Mandate to Permit Execution on Judgment for Compensatory Damages." In that motion, respondents requested that the court certify the trial court's compensatory-damages verdict as a final, executable judgment, notwithstanding that the court had reversed the award of punitive damages and remanded for a new trial.

On August 8, 1996, the Court of Appeals, in a published order, granted the relief sought by respondents over the dissent of one judge. *See* App. 1a & n.*. In so doing, the court rejected two contentions that petitioners had raised. First, the court held that Fed. R. Civ. P. 54(b) (as incorporated by the identical District of Columbia rule), permits the issuance of a final, executable judgment for compensatory damages even though a request for punitive damages remains outstanding. App. 3a-4a. Second, the court rejected petitioners' contention that issuance of a partial final judgment on compensatory damages would contravene this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), which holds that where the evidence relating to a plaintiff's requests for punitive and compensatory damages is overlapping or intertwined, the defendant has a Seventh Amendment right to a new trial on both issues. App. 4a-7a.[3]

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[3] The Court of Appeals noted that this issue ordinarily would be decided by the trial court on remand, but the court held that it would decide the issue *de novo* in view of the circumstances of this case. App. 5a-6a.

The Court of Appeals rejected both contentions and authorized execution on plaintiffs' compensatory damages award following issuance of the mandate. On August 22, 1996, petitioners filed a timely petition seeking rehearing or rehearing en banc of that ruling. On December 4, 1996, the Court of Appeals denied that petition over the dissent of one judge (*see* App. 8a), thereby rendering the August 8 decision ripe for this Court's review. *See* Supreme Court Rule 13.3. Petitioners now seek review of both the August 8, 1996 and the September 14, 1995 decisions, both of which raise important questions of federal law and both of which are in conflict with decisions of other lower courts.[4]

REASONS FOR GRANTING THE WRIT

By holding that the Seventh Amendment permits a partial retrial limited to the question of punitive damages, the Court of Appeals placed itself in conflict with this Court's governing decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and with the vast majority of lower courts that have ruled on the issue. The issue is an important and recurring one, and one whose resolution is critical to the fair assessment of punitive awards in this country. The petition should therefore be granted.

I. THE COURT OF APPEALS' DECISION PERMITTING A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES CONFLICTS WITH THIS COURT'S DECISION IN *GASOLINE PRODUCTS* AND WITH THE DECISIONS OF NUMEROUS OTHER FEDERAL COURTS

In *Gasoline Products*, this Court held that under the Seventh Amendment a partial new trial limited to a particular issue "may not properly be resorted to unless

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[4] Pursuant to the Court of Appeals' procedural rules, the mandate with regard to both the September 14, 1995 and August 8, 1996 decisions has been stayed pending resolution of the petitions for certiorari filed with this Court. *See* D.C. Ct. App. R. 41(b).

it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500.[5] In that case, the lower court had found error in the jury instructions relating to damages on a particular claim and had ordered a partial retrial on damages alone. This Court reversed, ordering a new trial on all issues relating to that claim because the question of damages was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500-01.

In this case, the Court of Appeals reversed the jury's award of punitive damages, but ordered a partial new trial limited solely to that issue. The court (relying on a prior opinion of its own that had interpreted *Gasoline Products*) rejected petitioners' contention that they had a Seventh Amendment right to demand a retrial on all issues relating to respondents' claims.[6] Although the court recognized that "some of the evidence previously presented to establish liability will also be relevant to the punitive damages claim," it nevertheless held that "the liability and compensatory damages issues on one hand, and punitive damages issues, on the other, are discrete and that a trial on punitive damages alone will be unaffected by our affirmance of the compensatory damage awards and the collection by the tenants of the sums awarded." App. 6a (relying on *Robinson* v. *Sarisky*, 535 A.2d 901, 908 (D.C. 1988)).

This ruling is in direct conflict with this Court's decision in *Gasoline Products*. In that case, the Court

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[5] As the Court noted, prior to the adoption of the Seventh Amendment, the common law did not allow partial retrials *at all*. *Id.* at 497-98.

[6] The Seventh Amendment is fully applicable to the local District of Columbia courts. *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974).

held that the question of damages could not be retried separately because much of the evidence required to prove damages was also necessary to prove liability. 283 U.S. at 499, 500. In this case—contrary to the Court of Appeals' statement that petitioners had "asserted no way in which the [questions of punitive and compensatory damages] are interwoven here," App. 6a—there is no question that the evidence necessary to prove respondents' purported entitlement to punitive damages is the *same* evidence necessary to prove liability for compensatory damages. Indeed, at the original trial of this case, respondents introduced *no* new evidence on the question of petitioners' liability for punitive damages, but instead relied solely on their evidence on their underlying claim for intentional infliction of emotional distress.[7]

In *Gasoline Products*, the Court required a new trial on all issues because the damages question could not be resolved without reference to issues considered by the first jury but it was impossible to discern from the verdict the jury's resolution of those issues. *See* 283 U.S. at 499. So too here. Respondents alleged a number of purported incidents in support of their claim of intentional infliction of emotional distress, and those allegations would also be relevant to their request for punitive damages. But it is impossible to discern from the verdict which of petitioners' evidence the jury credited and which it did not. Thus, as in *Gasoline Products*, the issue of liability for compensatory damages is so "interwoven" with the issue of punitive damages that petitioners have a Seventh Amendment right to a new trial on all issues before the same jury.

Given this Court's holding in *Gasoline Products*, and the inseparable relationship between the questions of liability and compensatory damages on the one hand,

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[7] The trial was bifurcated, with the question of punitive damages tried separately—to the same jury—following a trial on the questions of liability and compensatory damages.

and punitive damages on the other, it is not surprising that the overwhelming majority of lower courts to have addressed the issue—including the Third, Fourth, Fifth, Eighth, Ninth and Tenth circuits—have held as a matter of law that the Seventh Amendment entitles parties such as petitioners to insist that the same jury hear both issues.[8]

The reasoning employed by these courts is in direct conflict with the reasoning of the Court of Appeals in this case. For example, in *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992), the Tenth Circuit explained that:

> A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case. It is part and parcel of the liability determination and does not have any independent being until a jury has decided, based on the preponderance of the evidence, that not only was a defendant's conduct negligent, but that it was gross, willful, wanton or malicious. Proof of gross, willful, wanton or malicious conduct by a defendant *is not separate from proof of a defendant's negligence*. The evidence proving negligence establishes liability and the

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[8] *See Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1552-54, 1561 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Spence* v. *Board of Education of the Christina School District*, 806 F.2d 1198, 1202 (3d Cir. 1986); *Lanier* v. *Sallas*, 777 F.2d 321, 325 (5th Cir. 1985); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1388-89 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); *Atlantic Coast Line R.R.* v. *Bennett*, 251 F.2d 934, 939 (4th Cir. 1958); *see also Burke* v. *Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1178 (10th Cir. 1981) (en banc), *cert. denied*, 464 U.S. 824 (1983); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980); *Bankers Life & Casualty Co.* v. *C.M. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962); *Smyth Sales* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944).

> degree of negligence is determinative in the award of punitive damages.

Id. at 1554 (emphasis supplied).[9] *See also Lanier* v. *Sallas*, 777 F.2d 321, 325-26 (5th Cir. 1985) ("[T]he punitive-damage claim is dependent on establishing liability for compensatory damages and, in addition, establishing malice or some other aggravating circumstance. *It cannot be tried in isolation, and remand of that claim would necessitate retrial of the entire case*") (emphasis supplied); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980) (awarding new trial on all issues in part because "any award of punitive damages must turn on an assessment of [the defendant's] conduct").

These rulings also find support in recent decisions of this Court setting forth other constitutional constraints on punitive awards. *See BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). In these cases, the Court held that due process requires that juries and reviewing courts consider both the character and degree of a defendant's allegedly wrongful conduct before awarding or upholding punitive damages. *BMW*, 116 S. Ct. at 1598; *Haslip*,

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[9] In *Mason*, the court invoked the *Gasoline Products* rule twice. In that case, a jury had originally awarded compensatory damages but no punitive damages, and the Tenth Circuit reversed the compensatory award and remanded for a new trial. A second jury then returned an award of compensatory damages and a large award of punitive damages. On a second appeal, the Tenth Circuit held that because the issues of liability for compensatory and punitive damages are necessarily intertwined, the retrial was properly held on all issues even though the plaintiff had not cross-appealed the original denial of punitive damages. *Id.* at 1554. The court then reversed the second jury's award of punitive damages and allowed the plaintiff the option of accepting a remittitur of those damages. The court made clear, however, that if the plaintiff declined the remittitur, a second new trial was required on all issues. *Id.* at 1561.

499 U.S. at 19. Likewise, the Court has held that due process requires some relationship between the amount of a punitive award and the actual or potential damages caused by the defendant. *BMW*, 116 S. Ct. at 1598, 1601; *TXO*, 509 U.S. at 459-62; *Haslip*, 499 U.S. at 21, 23. These decisions confirm the central point being made here: that a jury's consideration of a request for punitive damages cannot be divorced from the evidence underlying the tort upon which the request is based.

Not only does the decision below conflict with *Gasoline Products* and with lower court opinions applying the rule in that case, but it is also fundamentally inconsistent with decisions from this and other courts interpreting Fed. R. Civ. P. 54(b). In *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976), this Court held that Rule 54(b) precludes entry of a final judgment on liability when the question of relief remains outstanding. Relying in part on that decision, the lower federal courts—with the sole exception of the Court of Appeals in this case—have held that Rule 54(b) prohibits the entry of a final, executable judgment for compensatory damages while the question of punitive damages remains outstanding, because a request for punitive damages cannot be separated from the rest of a plaintiffs' claim.[10] If, as these courts have held, a request for punitive damages is inseparable from the remainder of a plaintiff's claim under Rule 54(b), then it would be anomalous, to say the least, if such a request were nevertheless considered separable under the Seventh Amendment. *See Livesay* v. *Shollenbarger*, 19 F.3d 1443, 1994 WL 56923 at *3 (10th Cir. 1994)

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[10] *See Alonzi* v. *Budget Construction Co.*, 55 F.3d 331, 332 (7th Cir. 1995) (Posner, J.); *Arizona State Carpenters Pension Trust Fund* v. *Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991); *Sussex Drug Products* v. *Kanasco, Ltd.*, 920 F.2d 1150, 1154-55 (3d Cir. 1990); *see also General Acquisition, Inc.* v. *GenCorp, Inc.*, 23 F.3d 1022, 1028 (6th Cir. 1994) ("The fact that [plaintiff] seeks to recover two types of damages—compensation and disgorgement—does not convert a single claim into multiple claims").

(relying on *Mason*, *supra*, to hold that an order denying punitive damages was not separable claim under Rule 54(b) where liability and compensatory damages remained to be retried) (unpublished opinion).

Petitioners are aware of only one other appellate decision authorizing a partial retrial limited to punitive damages under the *Gasoline Products* rule. In *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988), the Second Circuit reversed an award of punitive damages as excessive but ordered a partial retrial limited to the amount of such damages. *Id.* at 375. That decision is in direct conflict with numerous other circuit court decisions (*see supra* n. 8), and petitioners believe that it contravenes *Gasoline Products*, particularly in light of this Court's recent decisions (*see supra* at 9-10) making clear that the question of the proper amount of punitive damages necessarily requires consideration of the evidence relating to the underlying tort. It should be noted, however, that the sole question in *Smith*—the proper *amount* of punitive damages—is less intertwined with the underlying claim than the questions to be retried in this case. Here, a second jury must decide whether the defendants' conduct justifies an award punitive damages *at all*, which will require it to consider the very same evidence as that supporting the underlying claim for intentional infliction of emotional distress.

In sum, the meaning of the Seventh Amendment presently varies by jurisdiction as it applies to the recurring question presented. In most jurisdictions, parties have a Seventh Amendment right to a new trial on all issues when an award of punitive damages is reversed and remanded. In a small minority, including the local courts of the District of Columbia, parties have no such right. This Court should resolve this conflict and ensure that the Seventh Amendment is applied uniformly throughout the federal court system.

II. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE THAT SHOULD BE RESOLVED BY THIS COURT

Given the increasing number and size of punitive damages awards rendered by juries throughout the Nation, and the increasing scrutiny accorded to those awards by this and other appellate courts, there is an acute need for guidance from this Court on the proper procedures to be employed upon reversal of a punitive award and remand for a new trial. Indeed, this Court's Due Process requirements respecting punitive damages would be undercut if those requirements mandated a new trial, but the new trial were itself completely unfair and in violation of the Seventh Amendment. Accordingly, both Due Process *and* the Seventh Amendment must be scrupulously and uniformly applied in the lower courts in order to ensure that punitive damages are fairly awarded. This Court has already addressed the Due Process requirements of such awards. It should now address the Seventh Amendment requirements.

This is particularly so given that, as shown by the large and conflicting number of reported decisions addressing the Seventh Amendment requirements, the content of those requirements is a constantly recurring question in the lower courts. And the question is bound to recur even more frequently if not resolved by this Court. It is well-known that "[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damages awards." *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (citing RAND Institute for Civil Justice, M. Peterson, S. Sarma & M. Shanley, *Punitive Damages—Empirical Findings* iii (1987)). At the same time, this Court has increasingly stressed that trial and appellate courts must rigorously scrutinize punitive awards to ensure that they comport with constitutional and other legal requirements. *See, e.g.*, *BMW*, *supra*; *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994); *TXO*, *supra*; *Haslip*, *supra*. Indeed, in *Honda* the Court held that the

Constitution mandates adequate appellate procedures for scrutinizing punitive damages awards.

This combination of factors—increasing numbers of punitive awards and increasing appellate scrutiny of those awards—will necessarily lead to more instances like the present case in which courts must determine the proper procedure to be followed upon reversal of a punitive award and remand for a new trial. Indeed, the Court recently recognized that, according to the most exhaustive study of punitive damages undertaken, more than half of punitive damages awards were appealed and in more than 10 percent of those cases, the court found the awards to be excessive. *Honda*, 512 U.S. at 433-34 n.11 (citing Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 57 (1992)). Accordingly, lower courts reviewing awards of punitive damages will increasingly be required to decide whether the Constitution permits a partial retrial on that question. Given the large number of decisions on this issue to date, the irreconcilable conflict among the lower courts, and the importance of the issue to the fair assessment of punitive awards, there is no cause for this Court to delay resolution of the conflict any longer.

Finally, the present case is a particularly appropriate vehicle for addressing the question presented. As described in our earlier petition, respondents' counsel, after creating an all-black jury to hear a case brought by black plaintiffs against white defendants, proceeded to inflame the passions of the jury by leveling unfounded accusations of racism against petitioners. The result was an enormous punitive damages award that the Court of Appeals reversed as unsupported by the evidence. The Court of Appeals, however, then permitted respondents to retry separately the issue of punitive damages before a new jury. If this ruling is not reviewed by this Court, the new jury will effectively be told that the evidence they are about to hear has already been determined sufficient

to prove the underlying tort—intentional infliction of emotional distress—even though the jury will not know which evidence the first jury credited and which it did not. It is submitted that such a prejudicing of the second jury is precisely what the Seventh Amendment and *Gasoline Products* prohibit. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

District of Columbia Court of Appeals

No. 90-CV-362

JONATHAN WOODNER CO., ET AL., APPELLANTS,

v.

FRANCISCA BREEDEN, ET AL., APPELLEES.

Before STEADMAN*, FARRELL, and KING, *Associate Judges*.

ORDER

(Filed August 8, 1996)

In this case, decided by this court in September 1995 (*Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995)), a jury awarded compensatory damages in favor of the seven tenant-appellees for nuisance and intentional infliction of emotional distress against appellants, their landlord and two other defendants ("management"). The amount awarded on the emotional distress claim was $75,000 for some tenants and $80,000 for others. The jury also awarded punitive damages against all defendants.

We reversed the compensatory damage awards on the nuisance claims. We also reversed the punitive damages awards against all three defendants, but remanded, with respect to two of the defendants, for further proceedings.

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* Believing that Super. Ct. Civ. R. 54(b), which prohibits the splitting by the trial court of a single cause of action for purposes of entering a final enforceable partial judgment, embodies a policy decision that should be applied uniformly, *see Merrell Dow Pharmaceuticals, Inc. v. Oxendine*, 593 A.2d 1023, 1026-27 (D.C. 1991) (issue of ordering partial new trial "is quite different from that of determining when a final judgment may be entered"; "[t]hat Rule 54(b) *could* have drawn the line differently with respect to when final judgments might be entered does not answer the question where Rule 54(b) in fact *did* draw the line"), Judge Steadman dissents from the entry of this order.

Finally, we affirmed the compensatory damage awards on the emotional distress claims. *Id.* at 943.

This matter is before the court on the tenants' "Emergency Motion for Issuance of Mandate to Permit Execution of Judgment for Compensatory Damages," management's opposition thereto, the tenants' reply to the opposition, and management's response to the reply. By this motion, the tenants are seeking to collect the compensatory damages awarded on the emotional distress claims, which we explicitly affirmed, without having to wait for resolution in the trial court of the remaining punitive damages claims. We have deferred ruling on this motion pending resolution of the separate petitions for rehearing or rehearing en banc that were filed by appellees and appellants. Those petitions were all denied[1] in a separate order of this court entered on July 25, 1996. We now consider the instant motion and although we do not formally grant the motion, we do order the ultimate relief sought by the tenants.

In their motion the tenants request that a partial mandate issue to permit them to execute on the judgments awarding compensatory damages on the emotional distress claims. The tenants reason that because this court has affirmed the compensatory damage awards on those claims, any issue of their entitlement to recover on those claims "has been conclusively and finally adjudicated." Management opposes the motion. Its main[2] argument is that the tenants may not execute until

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[1] The tenants' motion for rehearing was denied except for one minor revision in the opinion to clarify a point unrelated to the issues resolved in this order.

[2] Management also argues that the compensatory damage awards on the emotional distress claims have not been finally resolved in the tenants' favor because management can still seek review in the Supreme Court on the ground that the jury selection process violated the requirement set down in *Batson v. Kentucky*, 476 U.S. 79 (1986). We rejected the *Batson* claim and management is free to seek Supreme Court review of our ruling on that issue if it wishes. If that course is taken, any stay of the mandate

their entitlement to punitive damages has been retried to a jury. Management relies on this court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Oxendine*, 593 A.2d 1023 (D.C. 1991) (*Oxendine III*). But that case, unlike this one, involved the authority of the *trial court* under Superior Court Civil Rule 54(b) to enter final judgment as to compensatory damages while postponing trial on the issue of punitive damages. We held that the trial judge lacked that authority, because a claim for compensatory damages was not a "claim for relief" separate from that for punitive damages under the standard governing Rule 54(b) dispositions. *Id.* at 1025-26. Hence, we were compelled to dismiss the appeal for want of a final judgment or otherwise immediately reviewable order. *Id.* at 1028.

The present case, however, is quite unlike *Oxendine III* because it involves *this court's* authority to order relief. D.C. Code § 17-306 (1996) provides that this court "may affirm, modify, vacate, set aside or reverse any order or judgment . . . lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order . . . or require such further proceedings to be had, as is just in the circumstances." *Id.* That grant of authority is sufficient to justify a determination by this court, for the reasons stated below, that appellees may execute upon the judgment for compensatory damages without awaiting retrial on punitive damages. *See, Adams v. George W. Cochran & Co.*, 597 A.2d 28, 36 (D.C. 1991) (affirming back pay award, in wrongful discharge case, but remanding for new trial on question of damages for emotional distress suffered by employee); *Savoy Constr. Co. v. Alchernon & Keller, Inc.*, 388 A.2d 1221, 1225 (D.C. 1978) (In action to recover value of tools and equipment wrongfully converted, judgment affirmed as to all awards except for claims as to one piece of equipment which was

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would be governed by applicable procedural rules of this court and the Supreme Court.

remanded for retrial to determine damages on that claim only); *Alexander v. Evander*, 596 A.2d 687, 711-12 (Md. App.), *cert. denied*, 605 A.2d 137 (Md. 1991), *appeal after remand*, 650 A.2d 260, 266 (Md. 1994) (compensatory damages award affirmed, punitive damages award reversed and remanded for new trial; plaintiff collected the compensatory damages awarded in first trial before commencement of second trial for punitive damages only).

As further grounds for denying the plaintiffs in *Oxendine III* the remedy sought, we stated that neither of our prior decisions in that case "may fairly be characterized as [involving] a direct appeal from a final compensatory damage award." *Oxendine III*, *supra*, 593 A.2d at 1027. Neither decision arose from an "appeal[ ] from a final judgment in favor of the appellee." *Id.*[3] Therefore, we never passed upon the award of compensatory damages. In this case, by contrast, management has had every opportunity, in this appeal from a final judgment, to challenge both the finding of liability undergirding the compensatory awards and the size of the awards.

In that regard this case is more like *Robinson v. Sarisky*, 535 A.2d 901, 908 (D.C. 1988), where we upheld the trial court's determination that the issue of entitlement to punitive damages could be tried separately, before a different jury, from the trial on liability and compensatory damages. In *Robinson*, the jury returned a verdict finding liability and awarding compensatory damages, but could not agree on punitive damages. The trial court granted a mistrial on the punitive damages claim and ordered a new trial, over defense objection, on that issue alone. After a second jury awarded punitive

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[3] "[T]he first appeal was from the entry of a judgment in favor of Merrell Dow, notwithstanding the verdict, and the second appeal was from an order granting a new trial on the ground that an expert witness 'grossly misrepresented' his credentials. . . . Both appeals dealt with issues of liability, not damages." *Oxendine III*, *supra*, 593 A.2d at 1027.

damages, the defendant appealed, challenging the award of compensatory damages and claiming that it was denied a fair trial on the punitive damages issue because the issues of punitive damages and of liability/compensatory damages were so intertwined. In affirming, we found no basis for disturbing the award of compensatory damages. In addition, although we recognized that in some circumstances the liability/compensatory damages and punitive damages issues would be so interwoven that they could not be separated, we held that the trial court did not err in conducting a separate trial to determine punitive damages only. We did so because we concluded, under the circumstances present there, that the question of entitlement to punitive damages could be fairly tried separately from the issues of liability and compensatory damages.

We now turn to the same question in this case, *i.e.*, would a retrial on the sole issue of punitive damages be unfair to management? Although that question is one this court is fully capable of making, we would ordinarily leave it to the trial court, in the first instance, to pass on that point. We would do so because of the trial court's greater familiarity with the circumstances of the particular case. Thereafter, any review by us of the trial court's ruling on the point would be deferential. *Id.* at 908 (review for abuse of discretion). Here, however, the judge, who presided over the trial that took place some seven years ago, has long since retired.[4] Because that judge has not taken senior status,[5] she will not be available to resolve this issue. Therefore, if we were to defer to the trial court, the resolution of this issue would necessarily have to be made by a judge who is unfamiliar with a record that includes thousands, upon thousands, of pages of transcripts and other papers. We think it unlikely that any judge of the trial court, new to this case,

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[4] DISTRICT OF COLUMBIA COURTS ANNUAL REPORT 40 (1991).

[5] DISTRICT OF COLUMBIA COURTS ANNUAL REPORT 47-48 (1995).

could become any more knowledgeable of the contents of this record than we are, having recently decided numerous related issues in the appeal. Moreover, we note that the bulk of the conduct giving rise to the emotional distress claim occurred in 1979 and 1980, over sixteen years ago. We see no basis for further delaying the tenants' opportunity to collect on the relatively modest compensatory damage awards made in this case.

For all these reasons we think it appropriate to make the determination ourselves, rather than remand for that purpose. And, based on our own familiarity with this record, we are satisfied that the liability and compensatory damages issues on one hand, and punitive damages issues, on the other, are discrete and that a trial on punitive damages alone will be unaffected by our affirmance of the compensatory damage awards and the collection by the tenants of the sums awarded.

We do not doubt that in this case, some of the evidence previously presented to establish liability will also be relevant to the punitive damages claim. We see no reason, however, why that circumstance will confuse the jury. As we said in *Robinson*, the "second jury [will make] its own finding [on the issue of malice based] on evidence presented to it at the second trial—essentially the same as that presented at the first trial." *Id.* Nor is there any reason to believe the defense, at a trial on punitive damages, will be hindered in presenting its defense by inability to relitigate issues concerning the compensatory damage award. *Id.* Moreover, while *Oxendine III* was arguably an "example" of how compensatory and punitive damage awards can be intertwined, management has asserted no way in which the two are interwoven here. The problem we identified there—that the jury's verdict rested on multiple theories of liability, *id.* at 1027-28—is absent here because the only theory of liability upheld in this case is intentional infliction of emotional distress, on which the jury awarded the tenants discrete damages. In sum, on this record, the two

issues are independent and a retrial on punitive damages provides no basis for further delay in letting appellees' execute upon the compensatory damage awards.

For all of these reasons we hold that once the mandate has been received in the trial court, the tenants may seek to collect upon the judgment entered awarding them compensatory damages on the emotional distress claim.

SO ORDERED.

PER CURIAM.

APPENDIX B

District of Columbia
Court of Appeals

No. 90-CV-362 [December 4, 1996]

JONATHAN WOODNER COMPANY, ET AL.,

Appellants,

CA12817-80

v.

FRANCISCA BREEDEN, ET AL.,

Appellees.

BEFORE: **Wagner, Chief Judge; **Ferren, Terry, *Steadman, Schwelb, *Farrell, *King, Ruiz, and **Reid, Associate Judges.

ORDER

On consideration of appellants' petition for rehearing or rehearing en banc, the response thereto, appellants' motion for clarification of panel's August 22, 1996, order, the opposition and the reply thereto, appellants' motion to recall the August 2, 1996, mandate and to stay execution pending resolution of the rehearing petition before this court and a certiorari petition to the U.S. Supreme Court, the statement and the reply thereto, it is

ORDERED by the merits division* that the petition for rehearing and the motion for clarifica[ti]on are denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied; and it further appearing that this

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** Chief Judge Wagner and Associate Judges Ferren and Reid have recused themselves from this case.

court's order filed September 6, 1996, recalled the mandate and stayed execution pending resolution of the rehearing petition, it is

FURTHER ORDERED that the motion to recall mandate is otherwise denied, the stay is lifted, and the mandate shall issue in accordance with D.C. App. R. 41.

PER CURIAM

Associate Judge Steadman would grant the petition for rehearing.

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Supreme Court, U.S.
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No. 96-997

In The

Supreme Court of the United States

October Term, 1996

JONATHAN WOODNER CO., et al.,

Petitioners,

v.

FRANCISCA BREEDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The District Of Columbia
Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If this Court concludes: (i) this petition is timely; (ii) that the constitutional issue it presents was presented or passed on below; and (iii) that the U.S. Courts of Appeal are divided on the resolution of the issue, the question then remaining is:

> Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) and by every U.S. Court of Appeals to reach the issue, allows an appellate court to invoke its statutory authority to order a partial new trial limited solely to the issue of punitive damages.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Francisca Breeden, *et al.*, respectfully pray that the Court deny a writ of certiorari to review the order of the District of Columbia Court of Appeals entered in this proceeding on August 8, 1996.

STATEMENT OF THE CASE

This case is the second of two filed by these petitioners (defendants in the trial court) one month apart. (See Docket No. 96-821). The first petition, presenting a jury selection issue, seeks review of a judgment entered by the District of Columbia Court of Appeals on September 14, 1995. This petition purports to seek review of an August 8, 1996 order in which the Court of Appeals simply elaborated its reasons for entering the September 14, 1995 judgment. Petitioners waited until December 22, 1996, to seek review by certiorari of the August 8th order – purporting to grant themselves an extention of time for filing this second petition for certiorari by filing a *second* petition for rehearing in the Court of Appeals. Petitioners then filed their second petition for certiorari with this Court within ninety days after their second petition for rehearing was denied.

A. Bifurcated First Trial Requested By Petitioners

Respondents (successful plaintiffs in the trial court) initiated these proceedings by filing a complaint in September of 1980. For more than sixteen years since then they have been attempting to bring this matter to closure.

The appellate court described the complaint as:

> an action seeking damages for nuisance and intentional infliction of emotional distress grounded in allegations of poor housing conditions *and intimidation by the landlord* in attempting to convert the premises from rental to condominium use at Park Tower, an apartment building in Washington, D.C., brought by former tenants ('tenants') against three defendants . . . : the owner of Park Tower, the Jonathan Woodner Company ('Woodner Co.'); the estate of the Vice-President of the Woodner Co., Jonathan Woodner ('Estate'); and Steven Z. Laufer . . . (underlining added)

Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 931-32 (D.C. 1995).

After a nine year delay, because of "discovery delays, stays due to the pendency of related actions, and a mistrial following Jonathan Woodner's death," *id.* at 933, the matter proceeded to judgment. At defendants' request, trial of the case was bifurcated, with trial on liability and compensatory damages commencing first. At its conclusion the jury returned a verdict, totaling $965,000, on all claims and counterclaims in favor of all nine plaintiffs. After a two-week recess, and a separate trial on punitive damage issues, the jury returned verdicts against each

defendant in amounts ranging from $1.5 million to $9 million.

B. Unitary New Trial Not Demanded In Post-Trial Motions

The defendants filed post-trial motions. None of their motions alleged an entitlement to a new trial on *all* issues if the trial court set aside the judgments for punitive damages.

On March 23, 1989, the trial judge issued a lengthy opinion denying the motions and concluding:

> There was no miscarriage of justice when the jury acted within its province in crediting plaintiffs' testimony and rejecting defendants' presentation. Neither was there a miscarriage of justice when the jury gave its collective view of the dollar value of such unmeasurables as annoyance, discomfort and emotional distress nor when it gave its collective view on the amount of money which would deter future conduct of the type displayed by the evidence in this case.

(R.5645)*

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* "R" refers to the record filed with the D.C. Court of Appeals. "App." refers to the appendix to the petition for a writ of certiorari. "Pet." refers to the petition itself.

C. Unitary New Trials Not Requested In Appellate Briefs Or At Oral Argument

In separate and joint briefs to the D.C. Court of Appeals, each defendant paid particular attention to the judgments for punitive damages. None, however, argued that "The Seventh Amendment [does not] permit [ ] a partial retrial limited to the question of punitive damages . . . " Pet. at 5. Each defendant also filed a reply brief. Again, none of those briefs argued that if the judgments for punitive damages were reversed, defendants were entitled to a new trial on all issues.

Nor did any defendant make that claim at the oral argument of the appeal.

On September 15, 1995, the appellate court issued its decision and judgment. It expressly affirmed the compensatory damages judgment for intentional infliction of emotional distress. *Id.* at 943 ("The judgment for compensatory damages for intentional infliction of emotional distress is affirmed.")

However, the court announced new law on punitive damages – (1) requiring proof of liability by "clear and convincing" evidence, and (2) requiring a plaintiff who seeks to recover punitive damages based upon wealth, to show the defendant's "net worth" at the time of trial. The decision retroactively applied those new evidentiary and liability standards to this then-fifteen year old case. The appellate court also ruled that punitive damages could not be recovered against a decedant's estate. The punitive damages claims were remanded for a new trial.

The parties filed timely cross-petitions for a rehearing or rehearing *en banc* of the punitive damages issues.

D. Absolute Right To Unitary New Trial Not Claimed In Opposition To Emergency Motion Or In Second Petition For Rehearing

The petitions for rehearing did not in any way challenge the appellate court's affirmance and entry of judgment on the compensatory judgments for intentional infliction of emotional distress. Moreover, in the District of Columbia Court of Appeals it sometimes takes many months, or even years, before a ruling issues on a petition for rehearing. To avoid that delay, plaintiffs filed an "Emergency Motion For Issuance Of Mandate To Permit Execution On Judgment For Compensatory Damages."

Defendants opposed plaintiffs' motion. However, they did not contend that, *as a matter of law,* plaintiffs could not execute on their judgments because defendants were entitled to a re-trial of all issues. Instead, adopting case law of the Court of Appeals, they acknowledged that the scope of a retrial "is a question 'that should be decided by the particular litigation.' " Opposition at 5. They urged that on remand the trial court be tasked to determine "whether the trial could be fairly limited to the issue of punitive damages alone." *Id.*

Before the appellate court ruled on the Emergency motion, an order issued on July 27, 1996 denying the parties' cross-petitions for rehearing on punitive damages. Defendants obtained a thirty day extension of time, to November 22, 1996, from Chief Justice Rehnquist to file a petition for certiorari. On November 22 defendants

docketed No. 96-821, seeking review of the September 14, 1995 judgment, but limiting the "Question Presented" to a jury selection issue.

On August 8, 1996, the appellate court issued an order relative to the then-moot Emergency motion. The order elaborated on its reasons for entering partial judgment for plaintiffs on September 14, 1995. In explanation, the court cited its statutory "authority to order relief," Pet. at 3a, including its authority to "affirm . . . any order or judgment . . . [and to] require such further proceedings to be had, as is just in the circumstances." *Id.* Finally, citing its superior familiarity "with a record that includes thousands, upon thousands, of pages of transcript and other papers," Pet. at 5a, the appellate court rejected defendants' claim that plaintiffs should not be permitted to execute on their partial judgment for compensatory damages because a new trial on all issues might be appropriate.

On August 22, 1996, defendants filed what purported to be a *second* petition for rehearing or rehearing *en banc*. The petition requested reconsideration of the explanatory August 8 order. The petition did not contend that, as a matter of law, a retrial of all issues was required when a judgment for punitive damages is reversed and remanded. Indeed, it argued that the scope of a retrial is such a fact-bound issue that "a trial judge's discretion is needed on the issue because a trial judge can do what this Court cannot: hold a hearing and take evidence." Appellants' Petition For Rehearing Or For Rehearing En Banc Of The Panel's August 8, 1996 Order at 7 n.3.

E. Untimely Petition For Certiorari

On December 4, 1996, the appeals court denied the second "rehearing petition" without comment. On December 22, 1996 – thirty days after the extended deadline granted by Chief Judge Rehnquist for seeking review of the September 15, 1995 judgment – defendants filed the present petition.

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari to review the August 8, 1996 Order of the D.C. Court of Appeals should be denied for three reasons.

First, the petition is untimely. Defendants failed to seek review, by November 22, 1996, of the September 5, 1995 judgment (as they could have) on grounds that: "The Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), [does not] allow[ ] a partial new trial limited solely to the issue of punitive damages." Pet. at i. Their attempt to evade this court's time requirement by filing successive petitions for rehearing should not be countenanced.

Second, the "Question Presented" was not presented to or passed on by the District of Columbia Court of appeals.

Finally, neither the September 15, 1995 judgment nor the August 8, 1996 order "conflict" with *Champlin*. Nor are the U.S. Courts of Appeal divided in their answer to the "Question Presented." *Every* circuit that has had

before it the question of whether to affirm or order a new trial limited to the issue of punitive damages has exercised its discretion affirmatively.

I. THE UNTIMELY FILING OF THE PETITION DEPRIVES THIS COURT OF JURISDICTION OVER THE CASE

This Court may exercise jurisdiction over "[f]inal judgments or decrees" rendered by the District of Columbia Court of Appeals. 28 U.S.C. §1257. A petition for writ of certiorari to secure review must be "applied for within ninety days after the entry of such judgment or decree." 28 U.S.C. §2101(c). However,

> if a **petition** for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . .

Sup. Ct. R.13.3.

Even after the denial of a petition for rehearing, the time to file a petition for certiorari may be extended by a justice of this Court "for a period not exceeding sixty days." 28 U.S.C. §2101(c).

The D.C. Court of Appeals rendered its only "judgment or decree" in this matter on September 14, 1995. The defendants filed a timely petition for rehearing in the appellate court. That petition was denied on July 25, 1996. Defendants then sought an extension of time to file a petition for certiorari in this Court. On October 11, 1996 Chief Justice Rehnquist extended the deadline for filing a petition to November 22, 1996.

On November 22, 1996, defendants did file a petition for certiorari with this Court (No. 90-861). But the "Question Presented" in that petition does not include a challenge to the entry of judgment for compensatory damages for intentional infliction of emotional distress on Seventh Amendment grounds. It, instead, addresses a jury selection issue.

Defendants are attempting an end-round challenge to the entry of judgment, on Seventh Amendment grounds, by the *present* petition which was filed on December 22, 1996 – thirty days after the generous extension of time granted by the Chief Justice.

Defendant-petitioners argue that they seek review of the August 8, 1996 order of the Court of Appeals. They contend that because they filed a second petition to rehear that Order on August 22, 1996, and then filed their petition for certiorari within three weeks after their second rehearing petition for rehearing was denied, this second petition is timely.

They are wrong for three reasons. First, if they lose on the jury selection issue (as they are certain to), the judgment for compensatory damages will be affirmed and plaintiffs will be able to execute on the judgment. This Court, then, will be unable to provide defendants with any meaningful relief. There is no point in relitigating liability for compensatory damages after the plaintiffs have collected their money damages.

Second, in the D.C. Court of Appeals a petition for rehearing will only lie to challenge the "entry of judgment" for a party. D.C. App. R.40(a); *see* 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene

Gressman, *Federal Practice and Procedure* §3986 at 471 (1977) (purpose of petition for rehearing is "to change and modify a prior judgment"). Defendants' miscaptioned "petition for rehearing" was directed at a court order, one that was issued *after* the entry of judgment. Their filing could not, therefore, be a "petition for rehearing" and could not toll the time for filing a petition for certiorari with this court. Sup. Ct. R.13.3. The deadline for seeking review by writ of certiorari of the August 8 order was November 8, 1996 (or November 22 after the Chief Justice extended the deadline). This December 22, 1996 filing comes too late.

Third, assuming the document defendants filed in the Court of Appeals could be characterized as a *bona fide* second petition for rehearing, it was ineffective to toll the time for filing a petition for certiorari under this Court's Rule 13.3. Rule 13.3 tolls the time for filing a petition for certiorari on only *one* occasion when a petition for rehearing is filed. Sup. Ct. R.13.3. ("[I]f *a petition* for rehearing is filed in the lower court . . . the time to file a petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . ")

If the Court's rule were otherwise, and tolled the time each time a party filed a petition for rehearing, any party seeking review of a state court judgment could grant himself as much time to file a petition for certiorari as he desired. By filing multiple petitions for rehearing, on the same or on various grounds in the lower court, the date for filing a petition for certiorari could be extended *ad infinitum*. Rule 13.3 sensibly prevents that practice by

granting a single dispensation to file a petition for rehearing that will act to toll the time to file a petition for certiorari with this Court.

For these reasons the present petition is untimely and this Court lacks jurisdiction over it. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

II. THE CONSTITUTIONAL ISSUE THE PETITION PRESENTS WAS NOT PRESENTED TO OR PASSED ON BY THE D.C. COURT OF APPEALS

Lack of jurisdiction is not the only obstacle preventing review. It is settled that this "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The "Question Presented" by the present petition raises for the first time in this litigation the issue of whether, *as a matter of law*, a trial and appellate court are barred by the Seventh Amendment from "allow[ing] a partial new trial limited solely to punitive damages":

> Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), allows a partial new trial limited solely to the issue of punitive damages.

Pet. at i. *See* Sup. Ct. R.14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.")

Presumably, defendants have framed the issue as one of law, rather than of fact or discretion, to entice this

Court to grant review. Sup. Ct. R.10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

The clear consequence of that strategy is that, in violation of a number of D.C. Court of Appeals rules, and this court's jurisprudence, defendants have presented a constitutional question and claim here that was never presented below.

At the briefing stage in the D.C. Court of Appeals, D.C. App. R.28(a)(6) require appellants to include in their brief a "short conclusion stating the precise relief sought." No defendant sought, anywhere in their brief, a trial on all issues if the judgment for punitive damages, alone, was reversed and remanded.

In their opposition to plaintiffs' Emergency motion in the appeals court, defendants relied on two D.C. Court of Appeals decisions – *Merrell Dow Pharmaceuticals, Inc. v. Oxendine*, 593 A.2d 1023 (D.C. 1991) and *Robinson v. Sarisky*, 535 A.2d 901 (D.C. 1988) – to argue that the *Champlin* issue was a factual one, requiring a finding as to what was fair:

> The question of whether 'punitive and compensatory damage claims are separate and distinct' or 'so interwoven that they cannot fairly be separated . . . ' is *a question that 'should be decided by the particular litigation.' Oxendine*, 593 A.2d at 1027. Therefore, on remand in this case the trial court would have to determine as an initial matter whether a trial could fairly be limited to the issue of punitive damages alone.

Opposition at 5.

In their miscaptioned Petition For Rehearing, the defendants again urged the D.C. Court of Appeals to treat the issue as a factual one – as to which *discretion* and judgment, rather than a rule of law, controlled. Defendants went so far as to request an *evidentiary* hearing on the *Champlin* issue and to urge that an appellate court is not equipped to address the issue:

> [T]he panel's decision to address the Seventh Amendment itself, rather than permitting the trial court to address it in the first instance, is puzzling . . . [A] trial judge's discretion is needed on the issue because a trial judge can do what this Court cannot: hold a hearing and take evidence.

Petition For Rehearing at 7 n.3. (emphasis supplied)

The strictly legal "Question Presented" by the present Petition is very different from the factual issue defendants shaped for the D.C. Court of Appeals. The two issues "are not in anywise necessarily connected . . . " *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899), quoted in *Illinois v. Gates*, 462 U.S. 213, 218 n.2 (1983).

In this case the D.C. Court of Appeals relied on the authority granted it in a statute enacted by Congress, D.C. Code §17-306 (1996), 84 Stat. 565, Pub. L. 91-358, Title I, §146(a)(6), to enter partial judgment and to remand this matter for trial on punitive damages alone. Pet. at 3a. If defendants had argued (as they do for the first time here) that, as a matter of law, the statute as applied in this case is unconstitutional, a number of things would have happened. First, D.C. App. R.52 would require defendants "to give immediate notice in writing" of that extraordinary claim, so that the Clerk of

the Court could "certify such fact to the Attorney General." *Id.*

Nothing of the kind happened here because the defendants never contended that a strictly legal issue was presented by their second "Petition for Rehearing."

This Court has explained the policy reasons for its "presented or passed on" rule on a number of occasions:

> Questions not raised below are those on which the second is very likely to be inadequate . . . And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Cardinale, 394 U.S. at 437. For both of the above reasons this Court does not, and should not, exercise jurisdiction over petitions such as this one.

III. THERE IS NO CONFLICT WITH *CHAMPLIN* AND THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE "QUESTION PRESENTED"

In the body of their Petition, the defendants alternate between adherence to the assertion inherent in their "Question Presented" – that, as a matter of law a court may not order a new trial limited solely to the issue of punitive damages – and an effort to make a factual showing [although a conclusory one] that it would be prejudicial to re-try punitive damages alone, in this particular case. The defendants' effort to invoke *Champlin* to support either effort is unavailing because its purpose and

holding are perfectly consistent with the ruling in this case.

The defendants' efforts to marshal Circuit Court authority that contradicts *Champlin's* reasoning is similarly unavailing. Every U.S. Court of Appeals, and every treatise we have found, rejects the notion that an appellate court does not have the discretion to reverse and remand for trial of punitive damages alone.

A. The Ruling In This Case Is Perfectly Consistent With *Champlin*

The Seventh Amendment to the Constitution provides two protections: (1) it safeguards the right to "trial by jury," and (2) it prohibits "re-examination" of facts except under limited circumstances:

> In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., Amdt. 7.

In *Champlin* the petitioner alleged a violation of the "re-examination" clause. Because at common law there was no practice of setting aside a verdict in part, the petitioner claimed the U.S. Court of Appeals for the First Circuit erred when it affirmed a jury's finding of liability for breach of contract, reversed its award of damages, but remanded for only a partial new trial: limited to ascertainment of damages.

This Court rejected the claim that the appellate court erred, as a matter of law, in ordering a partial new trial.

Id. at 498 ("[T]he Seventh Amendment does not exact the retention of old forms of procedure."). The Court held that the Seventh Amendment only requires that "in trial by jury . . . issues of fact be submitted with . . . instructions and guidance . . . " *Id.* at 498.

Consistent with its holding, this Court provided "guidance" for determining when ordering a partial trial would be consistent with Seventh Amendment concerns. First, the Court pointed to whether the issue to be retried was "distinct and independent of the others." *Id.* at 494. By that, the Court made clear, it meant "whether it was impossible from an inspection of the present record" to identify facts as to liability that must necessarily be known before a trial could be had as to damages. *Id.*

Because that is a factual issue, this Court undertook an extensive inquiry into the pleadings and evidence in the *Champlin* record and concluded that the questions of damages and liability in that record were so interwoven that the damage issue could not "be submitted to the jury independently of [liability] without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500.

The rule that emerges from *Champlin* is that an issue may be submitted to a jury, independent of others, if the issue is sufficiently "separable" that it can be submitted to a jury without "confusion and uncertainty."

Fed. R. Civ. P. 59(a) was drawn from the *Champlin* case. Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice And Procedure*, §2814 (1995). It is settled now that both trial and appellate courts can order

a new trial. *Id.* at 98. At either level the issue is one that calls for the exercise of discretion:

> Whether an appellate court should grant a new trial as to all or only some of the parties is a matter resting within its discretion. Similarly, it has a large discretion to grant a new trial as to all the issues, or a partial new trial.

6A James Wm. Moore, *Moore's Federal Practice* §59.06. *See also* Randy R. Koenders, Annotation, *Propriety Of Limiting To Issue Of Damages Alone New Trial Granted On Ground Of Inadequacy Of Damages – Modern Cases*, 5 ALR 5th 875 (1992) ("[I]t is generally agreed that an appellate court when remanding a cause for new trial because of error, may limit the scope of the new trial to the assessment of damages"); Annotation, *Separate Trial Of Issues Of Liability And Damages In Tort*, 85 ALR 2d 9, 14 (1962) (Issue of damages "may, in the discretion of the court, be tried before either the same or a different jury.")

Both the holding and reasoning in *Champlin*, and every commentor to address the subject, support the view that petitioners argued for in the appellate court (and have now spurned): whether a new trial can be limited to the issue of damages without causing "confusion and uncertainty" is a discretionary judgment. In this case the appellate court was peculiarly well equipped to make that judgment. App. 5a, 6a ("We think it unlikely that any judge of the trial court, new to this case, could become any more knowledgeable of the contents of this record than we are, having recently decided numerous related issues in the appeal.")

Champlin, therefore, is authority for *denying* a petition to grant a writ of certiorari to review the discretionary judgment that is reflected in the order of August 8, 1996.

B. Every Circuit Court of Appeals That Has Had Before It The Question Of Whether To Affirm, Or Order, A New Trial Limited To The Issue Of Punitive Damages Has Exercised Its Discretion Affirmatively

Despite *Champlin's* teaching, defendants make a remarkable claim:

> The overwhelming majority of lower courts to have addressed the issue – including the Third, Fourth, Fifth, Eighth, Ninth and Tenth circuits – have held *as a matter of law* that the Seventh Amendment entitles parties such as petitioners to insist that the same jury hear both . . . liability and compensatory damages on the one hand, and punitive damages on the other . . . (italics added)

Pet. at 7-8.

Intuitively, this cannot be true. A claim for punitive damages is particularly well suited for trial alone. As the appellate court explained in this case, there is no possibility of confusion or uncertainty precisely because proof of liability for punitive damages will require plaintiffs to reprise much of the evidence regarding the underlying tort they presented to the first jury. Pet. at 6a. Yet, as this Court has observed, liability for compensatory damages is readily separable from punitive damages. Damages for the former *must* be awarded if liability is found. Punitive damages, on the other hand, are never awarded as of

right. It is the product of a "discretionary moral judgment." *Smith v. Wade*, 461 U.S. 30, 51 (1983). In the District of Columbia, moreover, liability for punitive damages requires proof of tortious and malicious conduct by "clear and convincing" evidence.

Not surprisingly, then, every commentator to address the issue concludes the two issues are separable for trial before different juries. James D. Ghiardi & John J. Kircher, *Punitive Damages: Law And Practice* §12.11 (1996) ("If the case is appropriate for bifurcation of punitive damages, there is no constitutional bar to presenting that issue to a separate jury."); Linda L. Schlueter & Kenneth R. Redden, 1 *Punitive Damages* §6.3(B)(3d Ed. 1995) ("Although the issue of liability has been properly determined, a new trial can be heard on the punitive damages claim alone.")

It is, we think, a complete answer to defendants' claim that, as a matter of law, the Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits require the same jury to hear compensatory and punitive damages, to list the cases that flatly contradict that claim. With two exceptions (the Fifth and Tenth Circuits) we provide cases decided *after* the most recent case cited by defendants for the proposition that trial of punitive damages, alone, is not permitted in that Circuit. *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 663 (D.C. Cir. 1966) (*en banc*); *Vasbinder v. Scott*, 976 F.2d 118, 123 (2d Cir. 1992); *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 375 (2d Cir. 1988); *Brink's Inc. v. City of New York*, 717 F.2d 700, 702, 715 (2d Cir. 1983); *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699, 705 (3rd Cir. 1988); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1411 (4th Cir. 1992) (*en banc*); *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938

F.2d 502, 507 (4th Cir. 1991) (*en banc*); *Maxey v. Freightliner Corporation*, 727 F.2d 350, 352 (5th Cir. 1984) (rehearing); *Atkinson v. Dixie Greyhound Lines, Inc.*, 143 F.2d 477, 480 (5th Cir.), *cert. den.*, 323 U.S. 758 (1944); *Grimm v. Leinart*, 705 F.2d 179, 183 (6th Cir. 1983); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985); *Pulla v. Amoco Oil Company*, 72 F.3d 648, 661 (8th Cir. 1995) (J. White, retired); *Robertson Oil Co., Inc. v. Phillips Petroleum*, 871 F.2d 1368, 1376 (8th Cir. 1989); *Morrill v. Becton, Dickinson And Company*, 747 F.2d 1217, 1225 (8th Cir. 1984); *Williams v. Armontrout*, 977 F.2d 437, 441 (8th Cir. 1992); *Morgan v. Woessner*, 997 F.2d 1244, 1257-59 (9th Cir. 1993); *Spaeth v. Union Oil Company of California*, 710 F.2d 1455, 1460 (10th Cir. 1983).

The decision of the Fifth Circuit in *Atkinson* is also binding on the Eleventh Circuit, because it was issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Only two of the cases defendants rely on were handed down in their circuit after the most recent case for that circuit we have listed above. They are *Lanier v. Sallas*, 777 F.2d 1370 (5th Cir. 1985) and *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). But neither case addressed the issue presented by this petition.

In *Lanier* the issue was whether a claim for punitive damages is "an entirely separate and distinct cause of action", for purposes of appeal. *Id.* at 325. That is not the issue here. Just one year before *Lanier* was decided the Fifth Circuit rejected the knee-jerk rule defendants urge:

> The law is settled that an error at trial relating to one issue that does not affect the determination of other issues does not justify granting a new trial on any issue except the tainted one.

Eximco, Inc. v. Trane Co., 737 F.2d 505, 513 (5th Cir. 1980). That same year the Fifth Circuit expressly held that a ruling on whether punitive damages will be re-tried alone calls for a discretionary judgment:

> We find it to be an appropriate exercise of our discretion, to specify that any new trial granted should be limited to the issue of the amount of punitive damages to be awarded.

Maxey v. Freightliners Corp., 727 F.2d 350, 352 (5th Cir. 1984).

The decision of the Tenth Circuit in *Mason* also confirms what we have said. In that case the trial court decided that compensatory and punitive damages should be retried together. The appellate court confirmed that the ruling was a discretionary one: "[T]he trial court, upon remand, did not abuse its discretion in ruling that all issues of liability and damages were matters to be resolved by the jury." Thus, district courts in the Tenth Circuit are not under the illusion that the Seventh Amendment bars a retrial limited to the question of punitive damages. *E.G., Atencio v. City of Albuquerque*, 911 F.Supp. 1443, 1448 (D.N. Mex. 1995) (granting "new trial on the issue of punitive damages" rather than on all issues).

CONCLUSION

For the foregoing reasons, and because of the sixteen year delay in bringing this matter to closure, the petition for a writ of certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This is a racially-charged case in which respondents' counsel, representing all-black plaintiffs against all-white defendants, struck all potential white jurors, made unfounded charges of racism against the defendants in front of the resulting all-black jury, and then induced that jury to return a substantial punitive damages award that was completely unsupported by the evidence. Because of that lack of support, the Court of Appeals set the punitive award aside. Nevertheless, that court summarily rejected our claim that under *Batson* the entire jury verdict was infected by racism and should be set aside. Worse, even though the court ordered a new trial on punitive damages, it rejected our contention that because precisely the same evidence underlies the compensatory damages claims as underlies any request for punitive damages, a retrial limited solely to punitive damages contravenes the Seventh Amendment.

Significantly, respondents' counsel does not seriously challenge that the lower courts are deeply divided over the *Batson* and Seventh Amendment questions presented by our petitions. Neither does he dispute that these two constitutional questions are frequently recurring and that their resolution is important to the fair administration of justice in the Nation's courts. Instead, respondents' counsel contends that the two questions are somehow not presented by this case. As we will show, however, his contentions are based on distortions and misrepresentations of the record, and the Court should not allow his contentions to detract from the compelling case for certiorari presented here.

I. THE COURT SHOULD RESOLVE THE CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*

1. Respondents' principal answer to our *Batson* petition is that we are merely asking this Court to overturn the trial court's factual findings as "clearly erroneous."

See Opp. (96-821) at 11-12. That is not so. As respondents concede, "petitioners have attacked the *method* used by the District of Columbia Court of Appeals to determine whether a trial court's findings of fact are clearly erroneous." *Id.* at 12 (emphasis supplied). The central question presented here is not whether the trial court's findings are clearly erroneous, but whether the courts below applied an incorrect legal standard—which ignores the role of comparative analysis—to evaluate counsel's explanation for his apparently racially-based strikes. That is a question of law, and one that divides the lower courts and now merits this Court's review.

2. Respondents contend that the conflict in the lower courts is "irrelevant" here because the Court of Appeals purportedly applied the stringent *per se* rule of comparative analysis to petitioners' claims. *Id.* at 12-16. But respondents do not and cannot support this assertion with the Court of Appeals' decision in *this* case. Regardless of that court's conflicting decisions in *other* cases, the court clearly did *not* apply a comparative analysis to evaluate petitioners' claims in this case. *See* Pet. App. (96-821) at 6a n.5. Moreover, where, as here, there is a conflict among the decisions of various courts, the existence of an additional conflict among the decisions of a single court is a further factor supporting this Court's review. *See, e.g.*, *Scarborough* v. *United States*, 431 U.S. 563, 567 n.4 (1977); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

3. Respondents finally argue that even if the courts below had applied a rigorous comparative analysis, the behavior of respondents' counsel would have been sustained under *Batson*. *See* Opp. (No. 96-821) at 9-11. To support this argument, respondents make two new factual assertions that they raise for the first time in their brief to this Court. First, they assert that one of the black venirepersons (No. 605) whom the trial court found to be similarly situated to the stricken whites was not really similar because she "formally withdrew" her hardship

claim. *Id.* at 2, 10. Second, respondents imply that counsel would have used his final peremptory challenge to strike the second black venireperson whom the trial court found to be similarly situated (No. 627), if only petitioners had not struck him themselves. *Id.* at 3, 9-10.

As shown below, neither of these belated assertions is supported by the record. More significantly, however, under *Batson* and its progeny counsel was required to make these kinds of assertions to the *trial court* so that court could assess their credibility contemporaneously with the challenged strikes. Here, counsel did not make either of his current assertions either to the trial court or even to the Court of Appeals. And the mere fact that it has taken counsel nearly eight years to conjure up these assertions serves to underscore that the purportedly "neutral" explanations that counsel gave at the time of his challenges were, in fact, pretextual.

Indeed, the record plainly confirms that counsel's new assertions are complete afterthoughts that cannot withstand a comparative analysis. The claim that No. 605 (who sat on the primary jury) was not similarly situated to the stricken whites because she "formally withdrew" her claim of hardship is refuted by the trial court's own findings. Comparing No. 605 to No. 642, the white female struck by counsel, the trial court noted that both gave nearly identical responses when questioned about their claims of employment hardship:

> One of the black women [No. 605] indicated to us that indeed she guessed she could make it; they could find somebody. Likewise, the white wom[a]n who was struck [No. 642] indicated that while it was a hardship, they could manage, and that [a lot] of people faced hardships.
>
> On the basis of that explanation and the data that the Court has before it, *it is hard pressed to find an explanation other than race* for selecting two women, both relatively young, both of whom first

> expressed some difficulty and then indicated they could manage.

Pet. App. (96-821) at 60a (emphasis supplied). This similarity between these two jurors, and the failure of the courts below to justify approving counsel's disparate treatment of them, is itself sufficient reason to grant certiorari to resolve the conflict on the question presented.

The record, however, also belies counsel's new-found suggestion that he would have stricken the other similarly-situated black venireperson (No. 627) identified by the trial court. First, the trial court initially proposed that *all* venirepersons who had answered "yes," to the first two questions on their questionnaires, which inquired about hardships (*see* Opp. App. (96-821) at 1a, 4a) be excused for cause, but respondents' counsel opposed that suggestion. *See* Feb. 22, 1989 Tr. (9:30 a.m.) at 118-19 (R. HH). Then, of the four venirepersons found by the trial court to have expressed similar job concerns, counsel challenged *only* the two whites for cause, specifically *opposing* petitioners' motions to remove No. 627 (whom counsel now implies he would have peremptorily challenged) as well as to remove No. 605. *Id.* at 127-28, 119-20. And even after counsel's challenges for cause were denied, counsel specifically recalled the two whites—but not the similarly-situated blacks—for further questioning and renewed his challenges for cause against them. *See* Feb. 23, 1989 Tr. (10:12 a.m.) at 10-11 (Supp. R. #5). Finally, counsel could have, but did not, strike No. 627 with his first two peremptory challenges, striking white venirepersons instead.

In the face of this record, counsel's newly-discovered rationales for his behavior are plainly untimely and in any case ring hollow. More importantly, even if those arguments had been presented to the courts below, they would not have justified counsel's disparate treatment under the rigorous comparative analysis of *prima facie* race-based strikes endorsed by courts in other jurisdic-

tions.[1] The conflict is thus squarely presented by this case and should be resolved by this Court.

II. THE COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE SEVENTH AMENDMENT PERMITS A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES

1. Respondents devote nearly the whole of their opposition in No. 96-997 to arguing that our Seventh Amendment claim is untimely and was not raised below. Neither argument is correct. They argue that we were obligated to raise the claim in a petition from the Court of Appeals' original September 14, 1995 decision, because the court's later August 8, 1996 order merely "elaborated" on its reasons for deciding the question in its earlier ruling. *See* Opp. (96-997) at 1, 6. In fact, the September 14, 1995 opinion nowhere even addressed the question. Indeed, the later August 8 order was issued in response to *respondents'* own motion, filed after the 1995 opinion, that the court authorize execution on the judgment for compensatory damages, a motion petitioners expressly opposed on the ground that such execution would contravene their Seventh Amendment rights. Thus, in the August 8 order, the court for the first time "turn[ed] to the . . . question" whether "a retrial on the sole issue of punitive damages [would] be unfair to [petitioners]." Pet. App. (96-997) at 5a. Noting that it "would ordinarily leave it to the trial court, in the first

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[1] Significantly, respondents nowhere justify the second prong in counsel's race-based strategy—his unsupported charges of racism before the all-black jury. Without identifying any record support, respondents merely state that the charges were justified by the jury's verdict on petitioners' counterclaim for libel based on a sign that was hung outside a plaintiff's window. *See* Opp. (96-821) at 11. But respondents' defense at trial was *not* that the sign spoke the "truth"; rather, respondents' *own* testimony was that the sign was directed to racism *in general*, and was not meant to charge petitioners with racism. *See* Mar. 1, 1989 (2:10 p.m.) Tr. at 53 (R. WW); Mar. 3, 1989 (10:35 a.m.) Tr. at 19-20, 24-25 (R. FFF); Mar. 6, 1989 (3:50 p.m.) Tr. at 28-29 (R. JJJ).

instance, to pass on that point," *id.*, the court nevertheless decided the question itself. *Id.* at 6a-7a. Petitioners thereafter sought review of that decision in this Court, following the Court of Appeals' denial of rehearing.

2. Respondents assert, however, that our petition for rehearing of the August 8 order did not toll the time for petitioning for certiorari from that order. This too is wrong. Under this Court's rules, "the time to file a petition for certiorari runs from the date of the judgment or order sought to be reviewed," but "if a petition for rehearing is timely filed in the lower court by any party," the time to file the petition for certiorari runs from the denial of the petition for rehearing. Sup. Ct. R. 13.3.[2]

Respondents nevertheless argue that our petition for rehearing was not authorized by the Court of Appeals' own rules. *See* Opp. (96-997) at 9-10. But they fail to inform this Court that the Court of Appeals itself rejected that very argument. On August 2, 1996, the court erroneously allowed its mandate to issue prior to its August 8 order. Petitioners then moved the court to recall that mandate pending resolution of the petition for rehearing of the August 8 order. On September 6, 1996, the court held that its mandate had been issued in error, recalled the mandate, and stayed it "pending resolution of the rehearing petition before the court." Order of September 6, 1996. Then, on September 16, the court ordered respondents to file a response to the rehearing petition, necessarily rejecting respondents' express contention that no petition for rehearing was authorized. *See* Appellees' Statement Regarding Appellants' Motion to Recall August 2, 1996 Mandate and to Stay Execution

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[2] A petitioner, of course, cannot avoid the time constraints by filing successive petitions for rehearing from the *same* judgment or order. But if, as here, a lower court elects to issue successive judgments or orders, each of which is subject to a petition for certiorari, then Rule 13.3 provides that a timely filed petition seeking rehearing of each order will toll the filing period for the petition for certiorari from that order.

at 1-2 (filed Sept. 13, 1996). The court then considered the petition on its merits, denying it over the dissent of one judge who would have granted rehearing. *See* Pet. App. (96-997) at 9a. Thus, contrary to respondents' current contentions, the Court of Appeals necessarily ruled that the petition for rehearing was proper, and that court's construction of its own rules regarding rehearing petitions should be found controlling here. *See Missouri* v. *Jenkins*, 495 U.S. 33, 50 (1992).

It is true that the Court of Appeals, by issuing two successive rulings in this case, has created an unusual procedural posture requiring two petitions raising different constitutional questions. But petitioners have timely presented those questions in full compliance with this Court's rules and should not be prejudiced by the Court of Appeals' decision to issue two separate rulings.[3]

3. Respondents next misrepresent the record by asserting that the Seventh Amendment question was not even raised below. As noted, petitioners raised that issue in response to respondents' motion requesting immediate execution on compensatory damages. Before then, there was no need for petitioners to raise the issue, because—as the court itself recognized in its August 8 order—that question would ordinarily have been left to the trial court to decide on remand. *See* Pet. App. (96-997) at 5a. Thus, petitioners opposed respondents' motion in part because "on remand in this case the trial court would have to determine as an initial matter whether a trial could fairly be limited to the issue of punitive

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[3] Respondents contend that our second petition is untimely because if we do not prevail on our *Batson* claim, "this Court . . . will be unable to provide defendants with any meaningful relief." Opp. (96-997) at 9. This contention has nothing to do with the timeliness of our petition, and is mistaken in any event. The Court of Appeals' mandate has been stayed pending resolution of the petitions for certiorari, and execution on the judgment has been stayed by a supersedeas bond. Thus, respondents cannot execute on any judgment until the proceedings in this Court are completed.

damages alone."[4] Then, after the court addressed the issue in its August 8 order, petitioners argued in their rehearing petition that "a retrial limited to punitive damages would violate the Seventh Amendment right to a jury trial where, as here, the evidence underlying the compensatory and punitive awards is overlapping."[5] Thus, the question presented by the present petition—whether the Seventh Amendment permits a partial retrial limited to punitive damages in this case—was presented to the Court of Appeals at the earliest opportunity, and was considered and decided by that court. The question is therefore properly before this Court.

4. Finally, when they reach the merits of the Seventh Amendment issue, respondents argue that the question does not involve a legal determination at all, and that the lower courts have in fact uniformly rejected our position. Respondents, once again, are wrong.

The *Gasoline Products* inquiry requires an examination of the intertwining of the evidence relating to the issues sought to be tried separately. However, as shown

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[4] Appellants' Opposition to Appellees' Emergency Motion for Issuance of Mandate to Permit Execution on Judgment for Compensatory Damages at 5 (filed Oct. 31, 1995).

[5] Appellants' Petition for Rehearing or for Rehearing En Banc of the Panel's August 8, 1996 Order at 2 (filed Aug. 22, 1996). *See also id.* at 2 (decision "departs from controlling Supreme Court precedent (*Gasoline Products*) on the important question of when the Seventh Amendment precludes a limited retrial"); *id.* at 7 ("The panel's authorization of a limited retrial and an execution on tort damages is therefore in direct conflict with the *Gasoline Products* decision and violates defendants' Seventh Amendment rights"). Petitioners also argued alternatively, in a footnote, that the Court of Appeals' decision to address the question itself rather than leave it for the trial court on remand was "puzzling," primarily because there were trial judges who were familiar with the case. *Id.* at 7 n.3. Contrary to respondents' suggestions, this footnote was plainly an alternative argument, as petitioners principally contended that the August 8 decision contravened the Seventh Amendment as a matter of law.

by this case and those cited in our petition, due to the very nature of a punitive damages request, the evidence on that question is *necessarily* intertwined with the evidence underlying liability for compensatory damages such that a partial retrial would violate the Seventh Amendment. While it may be possible to imagine a hypothetical case in which a second jury hearing only punitive damages issues would not improperly re-examine issues considered by the first,[6] neither this case nor any cited by respondents is such a case.

Respondents nevertheless contend that the circuit courts have uniformly rejected our position (*see* Opp. (96-997) at 19-20), and in doing so they completely misrepresent the very cases upon which they rely. Eleven of their seventeen cited cases, while generally remanding for a new trial on punitive damages, did not reach or discuss the Seventh Amendment issue in any way.[7] Moreover, those cases are fully consistent with our position that a party may elect not to assert its Seventh Amendment right to a retrial on all issues. The remaining cases,[8] although supporting respondents' position, merely underscore the conflict on the question presented; for those cases certainly do nothing to change the fact that other circuits have ruled the other way on the issue, in support of the Seventh Amendment claim

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[6] For example, there could theoretically be a case (unlike this one) where the first jury issued extensive special verdicts on factual issues that obviate the need for the second jury to reconsider that evidence.

[7] One case, *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983), did not remand for a new trial at all.

[8] *Williams* v. *Armontrout*, 977 F.2d 437 (8th Cir. 1992); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) ("*Robertson I*"); *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988); *Maxey* v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984); *Grimm* v. *Leinart*, 705 F.2d 179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *Atkinson* v. *Dixie Greyhound Lines, Inc.*, 143 F.2d 477 (5th Cir.), *cert. denied*, 323 U.S. 758 (1944). The *Smith* case was cited in our petition.

made here. When these cases are considered with those cited in our petition (at 8 n.8), four circuits (the Third, Fourth, Ninth and Tenth) hold that the Seventh Amendment precludes a partial retrial limited to punitive damages, two circuits (the Second and the Sixth) hold to the contrary, and two circuits (the Fifth and the Eighth) have issued conflicting opinions on the subject, with the later opinions from those circuits supporting our view.[9] Thus, far from demonstrating uniformity in the lower courts, the cases cited by respondents further confirm that the question is a frequently recurring one that has sharply divided the lower courts.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions, the petitions should be granted.

Respectfully submitted,

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[9] In *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994)—an *en banc* rehearing after remand from *Robertson I*—four judges dissented on the grounds that the earlier decision authorizing a partial new trial had "disregarded applicable law" and should be reversed in light of this Court's recent punitive damages jurisprudence. *Id.* at 392-93 (Beam, J., dissenting). The majority believed that the law of the case prevented it from reopening the prior decision (*id.* at 376 n.5), but recent circuit precedent precludes such partial retrials. *See Burke* v. *Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).